Supreme Court, U. S.
FILED
SEP 15 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 76- 389

ALTON J. BAILEY
Respondent

versus

RYAN STEVEDORING COMPANY, INC., ROGERS TERMINAL AND SHIPPING CORPORATION, LOUISIANA STEVEDORS, INC., RAMSAY, SCARLETT AND COMPANY INC., BATON ROUGE MARINE CONTRACTORS, INC., and LOCAL 1830 and LOCAL 1833, GENERAL LONGSHORE WORKERS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO
Petitioners

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Local 1830[1] and Local 1833[2] General Longshore Workers, International Longshoremen's Association, AFL-CIO (hereinafter called Petitioners or Union), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled matter on June 17, 1976.

OPINIONS BELOW

The original opinion of the Court of Appeals entitled

1. The predominantly black local.

2. The predominantly white local.

Alton J. Bailey vs. Ryan Stevedoring Co. Inc., et al., No. 74-2544, rendered March 11, 1976 is reported at 528 F.2d 551, 5th Cir. 1976 (Appendix A), rehearing by the court en banc denied per curiam, Clark, C.J. dissenting with written reasons, June 17, 1976, 533 F.2d 976 (Appendix B). The opinion of the district court is unreported, (Appendix C).

JURISDICTION

The Judgment of the Court of Appeals denying rehearing was rendered on June 17, 1976 (Appendix B). The original opinion remanded the case to the district court with directions to merge the black and white defendant Locals to comply with Section 2(c) of the Civil Rights Act of 1964, 42 USC 2000e. (Appendix A). A stay of mandate was issued on August 13, 1976, effective until September 15, 1976 (Appendix D). The jurisdiction of this Court rests on 28 USC 1254(1) and 28 USC 2101(c).

QUESTIONS PRESENTED

1. Does Title VII of the Civil Rights Act of 1964 require the merger of two longshoremen union locals, one local composed predominantly of black employees, the other of white employees, when employees join either local as a matter of personal preference and choice, when there has not existed discrimination in terms of hiring, placement, pay, working conditions and firing, and most importantly, when there has been no finding that there exists a potential for such employment discrimination in the continued operation of the independent locals and concomitant hiring system?

2. Does Title VII of the Civil Rights Act of 1964 require the merger of two longshoremen union locals whose members have elected to function on an essentially racially separate

basis in the absence of a factual determination that the continued operation of dual self governing locals, developed and continuing by true voluntary association of employees, actually discriminates or presently tends to discriminate against black employees?

3. Does the decree of the Court of Appeals compelling the merger of the predominantly white and black locals infringe on the First Amendment rights of association of members of both the white and black locals when there has not been a finding of either actual or potential discrimination in purpose or effect on employment?

4. Where the district court and the Court of Appeals determine that the individual purported class representative suffered no pre-Act or post-Act discrimination in employment and the purported class representative has failed to establish himself as a proper representative, his interests being antagonistic to that of the class, may the Court of Appeals under Rule 23(a) and (b) of the Federal Rules of Civil Procedure, order class wide relief directing the merger of the two locals?

5. Is an order which will have the effect of denying black employees their own voluntary association through which even prior to the Act they obtained, organizational, economic and social benefits equal it not superior to that of white employees a proper exercise in equity by the Court of Appeals?

STATUTORY PROVISIONS AND RULES INVOLVED

Section 2(c) of Title VII of the Civil Rights Act of 1964, 42 USC 2000e-2(c) (Appendix E)

42 USC 1981 (Appendix F).

First Amendment to the Constitution of the United States (Appendix G).

Federal Rules of Civil Procedure Rule 23(a) and (b) (Appendix H).

STATEMENT OF THE CASE

Longshoremen working in the Port of Baton Rouge, Louisiana are represented in collective bargaining by either of two local unions, both affiliated with the General Longshore Workers, International Longshoremen's Association, AFL-CIO. Local 1830 is a predominantly black local with approximately 232 members. Local 1833 is a local composed almost entirely of white employees numbering approximately 230. This balance in membership has existed between the two organizations since their formation in 1955. The inception of Local 1830 predates that of Local 1833 by two months.

Both locals are active in the South Atlantic and Gulf District of the International Longshoremen's Association. Each local has one vote in district-wide matters and the executive board of the district is equally divided in composition between black and white representatives.

Contract negotiations with employers, represented by the Baton Rouge Steamship Association, are done on a joint basis between the two locals. All grievances and contract disputes are handled in a similar mutual fashion. The two unions maintain a proportionate equal ratio in membership. Over the years, the two locals, with the cooperation of the employers, have made consistent efforts to offer black em-

ployees training and education opportunities to enable them to advance to more skilled positions on the waterfront. Because of the operation of independent locals, black employees have since before the passage of the Civil Rights Act of 1964 been able to actively participate in all phases of collective bargaining and related internal union affairs in the Port of Baton Rouge.

Work assignment in the Port is conducted out of a single hiring area. There are two daily "shape-ups" where foremen select employees for various gangs. The size of a gang is determined by the type of work to be done. Selection guidelines are set out in the bargaining agreement. There is no seniority system operative in the Port. A preference procedure is utilized to assure work to those individuals who have shown up at previous shape-ups and registered but who were not selected because of work fluctuations. Overall, hiring is done in a fashion as to assure the employment of an approximate equal number of black and white longshoremen. This reflects the ratio in union membership. There is no locked in "fifty-fifty" rule.

In the period of 1956 to 1973, black employees were assigned approximately 54% of the longshoremen's work in the Port. At the present time there are more black foremen and pushers than white. In short, there has been equal employment opportunities in the Port of Baton Rouge for both black and white longshoremen.

Plaintiff Alton J. Bailey is a black longshoreman. On March 11, 1971, he filed a charge with the Equal Employment Opportunity Commission in New Orleans, Louisiana, alleging racial discrimination in employment by the defendant local unions and five defendant stevedoring companies

against him and "other persons similarly situated". Following the processing of the charge by the EEOC, plaintiff instituted a class action under 42 USC 2000e-2(c) and 42 USC 1981 in the United States District Court for the Middle District of Louisiana seeking to redress alleged discrimination affecting himself and other "Negro persons who are employed, or might be employed by [the named defendant companies] or who are members or might be members of LOCALS 1830 and 1833. . . " The district court found that plaintiff was not discriminated against individually and further determined that there existed no discrimination in terms of employment toward any class of black employees by any of the defendants. As a result, the class action was dismissed.

Greatly influencing the district court's findings was a voluntary petition circulated among black longshoremen following the filing of plaintiff's lawsuit. The basic import of the petition was an expression of the signing members' desire not to be merged with the white sister local. The third paragraph of the petition capsulizes the spirit:

> We state Boudreaux, Wells and Bailey do not represent us as a class in their effort to integrate the unions. If the unions are integrated, we will lose (1) our right to equal jobs with the whites, (2) our right to elect our own officers and grievance committees, and (3) our right to our own meetings and a chance to hold office and act for the black longshoremen to protect their interest.

The petition was signed by 204 of the 232 members of Local 1830.

An appeal was taken by plaintiff and on March 11, 1976, the United States Court of Appeals for the Fifth Circuit

issued a decision reversing the judgment of the district court. (Appendix A) The Court of Appeals found no error in the district court's determination that plaintiff was not discriminated against in violation of Title VII of the Civil Rights Act of 1964. It likewise refused to reverse the district court's conclusion that plaintiff, as a purported class representative, did not share a community of interests with other black longshoremen. Moreover, the Court of Appeals recognized that no actual discrimination existed in the hiring practices and union representation on the Baton Rouge waterfront.

The basis for reversal was a finding by the Fifth Circuit that the 50%-50% hiring practice "represents a threat of employment discrimination . . .". Permanant injunctive relief against the continued operation of separate locals was mandated.

A petition for rehearing and for rehearing en banc was filed timely with the Court of Appeals by the defndants. On June 17, 1976, a per curiam deciaion was issued by the Fifth Circuit denying both requests. A dissent was filed by Circuit Court Judge Clark. (Appendix B).

REASONS FOR GRANTING THE WRIT

I. THE MERGER DIRECTED BY THE COURT OF APPEALS WILL DENY THE MEMBERS OF THE BLACK LOCAL THEIR RIGHT OF ASSOCIATION GUARANTEED BY THE FIRST AMENDMENT.

There is no question that a great majority of the black employees, most of whom are represented by Local 1830, do not desire to be merged with the predominantly white Local 1833. The members' petition asserts that social, political and economic harm will come to black employees if an indepen-

dent black sister local is eliminated.

The mandate of the Court of Appeals does not attempt to accommodate or otherwise recognize the demands of the class. Its failure to do so represents an infringement of the First Amendment rights of black longshoremen.

Courts have consistently acknowledged the rights of employees in both the private and public sectors to organize for mutual assistance and collective action. *Thomas v. Collins,* 323 U.S. 516 (1945); *Orr v. Thorpe,* 427 F.2d 1129 (5th Cir. 1970); *ASFCME v. Woodward,* 406 F.2d 137 (8th Cir. 1969). This Court has vigilantly guarded the right of association by striking down numerous legislative attempts to pry into, limit or hinder individuals' or groups' efforts to organize for whatever purpose. *United Mine Workers v. Illinois Bar Association,* 389 U.S. 217 (1967); *Gibson v. Florida Legislation Investigation Committee,* 372 U.S. 539 (1963); *Bates v. City of Little Rock,* 361 U.S. 516 (1960); *NAACP v. Alabama,* 357 U.S. 449 (1958).

Arguably, the right of the black employees in this case to organize separate and apart from their fellow white employees can be limited or curtailed if there is a clear threat of law violation. *Brandenburg v. Ohio,* 395 U.S. 444 (1969). The Court of Appeals has concluded that continuation of the dual locals functioning with a 50%-50% hiring system would "tend" to discriminate against future employees.

This directive is far too expansive. Concerning the regulation of First Amendment rights, this Court has stated that "(p)recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button,* 371 U.S. 415, 438 (1963). See also *Aptheker v. Secretary of State,* 378 U.S. 500 (1964). A judicial order

preventing future employment discrimination that does not take into consideration the associational rights of employees, especially a class of employees intended by Congress to be a major beneficiary of the Act sought to be enforced, must fall for reasons of overbreadth. *Elfbrandt v. Russel,* 384 U.S. 11 (1965).

A comparison to a statutory infringement on associational rights in the employment context is presented in *U.S. v. Robel,* 389 U.S. 258 (1967). The Subversive Activities Control Act of 1950 and its prohibitions against members of the Communist Party holding employment in defense industries was at issue. The Court recognized the justified concerns of the executive and legislative branches of government regarding espionage and sabotage in such a vital sector of the economy. Yet it balanced this governmental restriction with the rights of individuals. The outcome of the balance was a decision by the Court recognizing that "when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have 'less drastic' impact on the continued vitality of First Amendment freedoms." *Id* at 268.

The order of the Court of Appeals is indeed drastic and clearly has an impact on the First Amendment rights and demands of black longshoremen. A determination that a presently non-discriminatory organizational structure will perhaps some day in the future discriminate does not justify the broad order handed down. A less drastic order can be fashioned. Indeed, dismissal of plaintiff's lawsuit would preserve the associational rights of black employees, while at the same time leaving the door open for future litigants to correct any discriminatory action or practices that may develop. *Danner v. Phillips Petroleum Co.,* 447 F.2d 159 (5th Cir. 1971).

II. THE HOLDING OF THE COURT OF APPEALS TO THE EFFECT THAT THE MAINTENANCE OF SEPARATE LOCALS "TENDS" TO DISCRIMINATE IN VIOLATION OF THE ACT IS FACTUALLY AND LEGALLY UNSOUND.

The Court of Appeals is correct in its assertion that heretofore merger of separate locals was mandated when maintenance of the dual system was shown to produce *actual* discriminatory effects. In *United States v. Jacksonville Terminal Co.*, 451 F. 2d 418 (5th Cir. 1971); and *Equal Employment Opportunity Commission v. International Longshoremen's Ass'n*, 511 F. 2d 273 (5th Cir. 1975); the trial courts below were presented with a host of racially discriminatory practices which plagued longshoremen union structures in various ports. Based upon such findings, the appellate courts properly ordered or affirmed merger directives. The validity of this proposition was recently reaffirmed by the same court in *Local No. 293 v. Local 293-A*, 526 F. 2d 316 (5th Cir. 1976). In remanding a merger lawsuit because of jurisdictional questions, the court noted that

> the district court did not find, specifically, any "actual discriminatory effects on employment opportunities" as is required by *EEOC v. International Longshoremen's Ass'n*, supra, and *United States v. Jacksonville Terminal Co.*, supra. Should jurisdiction subsequently be found in this case, the plaintiffs must demonstrate such discriminatory effects.
> 526 F.2d at 319, n.4.

The Court of Appeals in the case at hand picked up on use of a 50%-50% hiring system by the defendants. The utilization of the same ratio was cited in *EEOC v. International Longshoremen's Ass'n.*, supra, as an indication of discrimination. The Court of Appeals' reliance on this past decision, a case involving actual discrimination, is misplaced. There is nothing in the record revealing that the parties have practiced or are locked into a 50%-50% rule. It is currently being followed only because union membership in the two locals is very close to 50%-50%.

It is of the utmost importance that there was no finding by the district court or court of appeals of pre-Act discriminatory practices or post-Act discriminatory practices or effects as to the class or individual members of the class. Indeed, the record reflects that black longshoremen have received collectively and individually, more hours of work at exactly the same rate of pay, more of the prestigious jobs such as foreman, leaderman, crane operator, and diesel mechanic, and have also received more of the less strenuous jobs such as flagman, waterboy and signalman.

Equitable relief should not be effected in situations where judicially imposed hardship on a defendant will be greater than that suffered by the party seeking relief. *Abeyta v. Town of Taos*, 499, F.2d 323 (8th Cir., 1974). Because the black longshoremen the plaintiff hoped to represent desire not to be so represented and further desire to avoid merger, it is they who will suffer in the proposed merger. When equitable relief is being contemplated by a court, serious consideration of possible inequitable ramifications for the defendant must be taken. *United States v. Systron-Donner Corporation*, 486 F.2d 249 (9th Cir. 1973). The fact that an action seeks vindication of a person or persons' civil rights does not operate to limit those basic principles of equity. *Douglas v. City of Jeanette*, 319 U.S. 157 (1943); *Williams v. Dalton*, 231 F.2d 646 (6th Cir. 1956).

As stated previously, dismissal of these actioins would not prejudice the rights of an individual or a class of individuals in any future legal attempt to eliminate any possible discriminatory practices that may arise. Nor would it do injustice to the national policy of equal employment opportunity to cause the modification of the appellate court's mandate. An order directing the defendants, for example, to fluctuate the hiring ratio to respond to the racial composition of the whole workforce would be a most appropriate remedy. Current preservation of associational rights would be realized and a permanent guard against future discrimination would be incorporated into the hiring system, which all parties agree is the crux of this action.

III. THE CLASSWIDE RELIEF ORDERED BY THE COURT OF APPEALS IS CONTRARY TO THE RULING OF OTHER COURTS OF APPEAL AND VIOLATES THE PROVISIONS AND SPIRIT OF FRCP 23

The plaintiff sought to represent all black longshoremen . The appellate court, however, correctly found that plaintiff was not a proper representative of the proposed class, and that based upon the unequivocal statement of rejection signed by most of the class, that his interest was antagonistic to that of the class. More importantly, the appellate court recognized that plaintiff had not suffered from any racial discrimination in employment by any of the defendants, including the local union.

Despite the collapse of both the class action strategy and individual claim of the plaintiff, the Court of Appeals nevertheless proceeded to mandate classwide relief in the form of a merger directive. No legal basis was established for the transition from a failing effort to show discrimination in employ-

ment against any employee to a broad order affecting all longshoremen, both defendant unions and all defendant employers, their contracts and longstanding harmonious, nondiscriminatory employment relationship notwithstanding.

A current trend in Title VII is the recognition of Title VII actions as "inherently class actions." *Rodriguez v. East Motor Freight,* 505 F.2d 40, 50 (5th Cir. 1974); *Hall v. Werthan Bag Corp.,* 251 F.Supp. 184 (M.D. Tenn. 1966). Such a broad pronunciation does not, however, abolish the restrictive procedural structure of Rule 23.

Classwide discrimination uncovered and proven during the course of an action brought by an individual, for instance, cannot be remedied on a class basis if the individual has not managed his or her action as a class action. In *Nance v. Union Carbide Corp.,* F.2d (4th Cir. 1976), 13 FEP Cases 231, an individual pursued a sex discrimination claim, alleging, among other things, an unlawful seniority system. The district court ordered virtual rearrangement of the entire system. *Nance v. Union Carbide Corp.,* 13 FEP Cases 211 (W.D. N. Car. 1975). The Fourth Circuit reversed on this point.

> Despite the fact that Title VII actions are described as "inherently class suits" and that the requirements of Rule 23 "must be read liberally in the context of suits brought under Title VII . . .", the plaintiff in such an action, in order to establish the right to proceed as a class representative, "must [like any other plaintiff] establish that the action meets the requirements of Rule 23(a);" employee discrimination suits do not represent exemptions from the terms of such Rule. [Citations omitted]. 13 FEP Cases 234

The fatal defect in plaintiff Nance's lawsuit was that she failed to properly style her lawsuit as a class action. See also *Washington v. Safeway Corporation*, 467 F.2d 945 (10th Cir. 1972).

The defect in plaintiff Bailey's lawsuit is twofold: his failure to be certified as a proper representative of the class in question and the blunt rejection of plaintiff by the class. Coupled with this procedural shortcoming is the fact that no individual discrimination was found to be exercised by the defendants against plaintiff and, furthermore, no past discrimination against any members of the proposed class was found. The law is clear that a class action cannot proceed absent a proper class representative. FRCP 23(a) (4); *Hansberry v. Lee*, 311 U.S. 32 (1940); *Albertson's, Inc. v. Amalgamated Sugar Company*, 503 F.2d 459 (10th Cir. 1974). The Fifth Circuit established a proper procedural transition for effecting class relief in *Huff v. Cass Co.*, 485 F.2d 710 (5th Cir. 1974). First, determine if there exits a "nexus" between the plaintiff and the class. Second, decide whether the plaintiff has a meritorious case. A winning plaintiff is not necessary for eventual class relief, but a representative plaintiff is. Neither of the above guidelines were followed by the Court of Appeals in this case.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted and the case set down for argument.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served on opposing counsel by mail this 13th day of September, 1976.

C. PAUL BARKER

Alton J. BAILEY, Plaintiff-Appellant,

v.

RYAN STEVEDORING COMPANY INC., et al., Defendants-Appellees.

No. 74-2544.

United States Court of Appeals,
Fifth Circuit.

March 11, 1976.

Civil rights action was brought by member of segregated longshore union local, on behalf of himself and other persons similarly situated, against five stevedoring companies and two union locals alleging various discriminatory employment practices. The United States District Court for the Middle District of Louisiana, E. Gordon West, J., dismissed action, and plaintiff appealed. The Court of Appeals, Ingraham, Circuit Judge, held that where views of majority of black longshoremen were antagonistic to those of plaintiff, trial court did not abuse its discretion in denying class action and proceeding to dispose of plaintiff's individual claim that he was victimized by isolated acts and general practices of discrimination, but that fifty percent-fifty percent rule whereby, as far as practicable, each longshore gang was composed of equal number of black and white longshoremen represented threat of employment discrimination because of fluctuation of membership of segregated union locals and thus motion for permanent injunction against continued operation of segregated locals should have been granted.

Reversed and remanded.

1. Federal Civil Procedure ⇐184

In civil rights action brought by plaintiff, a member of segregated union local, on behalf of himself and other persons similarly situated, against five stevedoring companies and two longshore union locals alleging various discriminatory employment practices, trial court did not abuse its discretion in denying class action and proceeding to dispose of plaintiff's individual claim that he was victimized by isolated acts and general practices of discrimination where views of majority of black longshoremen were antagonistic to those of plaintiff, the would-be standard-bearer for proposed class. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

2. Civil Rights ⇐46

Where plaintiff, a member of segregated longshore union local, did not prove that 50%-50% hiring practice rule whereby longshore gangs were composed of, as far as practicable, equal number of black and white longshoremen actually deprived blacks of employment opportunities but merely established that system would tend to result in discriminatory effect when there was membership imbalance between segregated locals, plaintiff was not entitled to recover back pay. Civil Rights Act of 1964, § 703(c)(2), 42 U.S.C.A. § 2000e-2(c)(2).

3. Civil Rights ⇐9.10

Where work was assigned when plaintiff, a member of segregated union local, made himself available, plaintiff worked fewer hours than average longshoreman because he voluntarily elected not to work by absenting himself from daily shape-ups at which longshoremen were hired, and plaintiff never applied for admission to available training programs necessary to qualify for placement in skilled longshoremen positions, plaintiff's average of fewer work hours per

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year than average longshoreman and employment decisions to exclude plaintiff from positions of responsibility and special skill were not product of discrimination against plaintiff by stevedoring companies nor union locals.

4. Civil Rights ⇐9.10, 46

Fifty percent-fifty percent hiring practice rule whereby, as far as practicable, longshore gangs were composed of equal number of black and white longshoremen from racially segregated union locals represented threat of employment discrimination in violation of Civil Rights Act of 1964 provision making employment practice unlawful if it "would deprive or tend to deprive" an individual of employment opportunities and thus motion for permanent injunction against continued operation of segregated locals should have been granted. Civil Rights Act of 1964, § 703(c)(2), 42 U.S.C.A. § 2000e–2(c)(2).

Appeal from the United States District Court for the Middle District of Louisiana.

Before COLEMAN and INGRAHAM, Circuit Judges, and O'KELLEY, District Judge.

INGRAHAM, Circuit Judge.

Appellant Alton J. Bailey, a member of Local 1830, filed a civil rights action against five stevedoring companies and two longshore locals charging them with various discriminatory employment practices at the Port of Baton Rouge.[1] In this action in behalf of himself and "other persons similarly situated," appellant sought injunctive relief, declaratory judgment and back pay. The trial court rejected appellant's claims and dismissed his action.

The following issues are presented on appeal: (1) Is appellant entitled to bring a class action in behalf of two hundred and thirty-two members of Local 1830 when two hundred and four members voluntarily state that appellant's claims are unrepresentative of the Local? (2) Is the trial court's finding that appellees were not engaged in discriminatory practices, policies or customs clearly erroneous? (3) Are segregated labor organizations, Locals 1830 and 1833, a violation of the Civil Rights Act?

CLASS ACTION

[1] Instituting this civil rights action under 42 U.S.C. § 2000e–2(c), appellant attempts to advance the interests of himself and "other persons similarly situated." Specifically, the intended class includes "Negro persons who are employed, or might be employed by [the five stevedoring companies named in the petition] . . . or who are members or might be members of LOCALS 1830

1. Appellant's action is based on Title VII of the 1964 Civil Rights Act. Section 703(c) provides:

> (c) It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.
>
> 42 U.S.C. § 2000e–2(c).

and 1833 . . . ." Appellees, however, submitted a voluntary petition to refute appellant's claim of fair representation. 204 of the approximately 230 members of Local 1830 stated in pertinent part:

> "We understand Boudreaux, Wells and Bailey claim to represent all black persons employed as longshoremen on the Port Allen docks since 1965 and all black persons who are members of Local 1830.
>
> "We understand they are seeking to join our black Local 1830 and the white Local together.
>
> "We state Boudreaux, Wells and Bailey do not represent us as a class in their effort to integrate the unions. If the unions are integrated, we will lose (1) our right to equal jobs with the whites, (2) our right to elect our own officers and grievance committees, and (3) our rights to our own meetings and a chance to hold office and act for the black longshoremen to protect their interest.
>
> "By maintaining our separate strength and not having it diluted by joining with the white Local we have been able to obtain the same wages, the same number of jobs and equal working conditions, including foremen and other jobs in the Port. If our Locals are put together a few dissatisfied black men can join with the white men and deprive the vast majority of black workers of their jobs and working conditions.
>
> "We do not want these three men, Boudreaux, Wells and Bailey to act for us as a class in this suit and we do not want our Local Union destroyed. We understand that if any of us want to we have the right to join the white union or stay a member of the black union now."

It appears, therefore, that the views of a majority of the black longshoremen are antagonistic with those of the appellant, the would-be standard bearer for the proposed class.

The trial court concluded that "[t]he facts of this case clearly establish that the claims of [appellant] are individual in nature and the issues raised by him are not issues common to any definable class too numerous to sue individually . . . ." and denied the class action under Rule 23, F.R.Civ.P. The suit was viewed, instead, as an individual action by appellant "for no one's benefit but his own."

In *Phillips v. Klassen*, 163 U.S.App. D.C. 360, 502 F.2d 362 at 365–66 (1974), cert. den. 419 U.S. 996, 95 S.Ct. 309, 42 L.Ed.2d 269 (1975), the court stated:

> "It is axiomatic that in order for a class action to be maintainable the representative party must adequately protect the interests of those he purports to represent. The concept is as old as the historic remedy of a class suit and as contemporary as the requirement of Rule 23(a)(4) of the Federal Rules of Civil Procedure that 'the representative parties will fairly and adequately protect the interests of the class.' . . . Where courts discern that the interests of the named plaintiff are in significant part antagonistic to those of the class he purports to represent, they decline to entertain the action as a class action."

See Wright and Miller, 7 Federal Practice and Procedure § 1768 (1972).

In the instant case we conclude that the trial court did not abuse its discretion in denying the class action. *Cf. Jones v. Diamond*, 519 F.2d 1090, 1097–1101 (5th Cir. 1975). The trial court properly proceeded to dispose of appel-

lant's individual claim that he was victimized by isolated acts and general practices of discrimination. *See Air Line Stewards and Stewardesses Ass'n v. American Airlines, Inc.*, 490 F.2d 636, 640–42 (7th Cir. 1973), *cert. denied* 416 U.S. 993, 94 S.Ct. 2406, 40 L.Ed.2d 773 (1974). We perceive no reversible error pertaining to the district court's ruling on appellant's attempt to make a class action out of a grievance which is clearly individual in nature.

EMPLOYMENT DISCRIMINATION

1. *Local Longshore Practices.* Locals 1830 and 1833,[2] organized in 1955, signed their first contract with the Baton Rouge Steamship Association[3] in 1956.

Longshoremen are hired at Port Allen, Louisiana, at "shape-ups"[4] conducted twice daily (7:00 A.M. and 5:00 P.M.) at a single hiring area. They are hired in racially integrated gangs composed of three to sixteen men, depending on the nature of work to be performed.[5] As far as practicable, each gang is composed of an equal number of black and white longshoremen[6] and may work under either a black or white pusher/foreman.

The association maintains employment records that indicate whether the union member was present at the shape-up and whether the member was hired. Preference is conferred on union members within the Local that were present but not hired at previous shape-ups. This

2. Local 1830, the senior longshoremen's labor organization, is composed exclusively of black members. Local 1833 is composed entirely of whites. The two racially segregated locals service the same geographic area (Port of Baton Rouge) pursuant to a single contract with Baton Rouge Steamship Association, and the locals operate a single hiring area.

3. The Baton Rouge Steamship Association is an association of six stevedoring companies that operate in the Port of Baton Rouge: (1) Baltimore Stevedoring Company; (2) Baton Rouge Marine Contractors; (3) Capitol City Stevedoring Co., Inc.; (4) Louisiana Stevedores, Inc.; (5) Rogers Terminal & Shipping Corp.; and (6) Ryan Stevedoring Co. (ceased local operations in May 1969).

The association negotiates a single contract with the two locals, both of which are represented during collective bargaining.

4. A "shape-up" is the hiring procedure at the Port of Baton Rouge. Longshoremen assemble in a single hiring area twice each day, and the foreman selects the necessary number of men to compose his gang.

5. A contract between the Locals and the stevedoring association governs the size of a longshore gang:

(1) general cargo, not less than 16 men;
(2) utilized cargo for vans, not less than 14 men;
(3) steel products, not less than 14 men;
(4) heavy lifts and package steel, not less than 12 men;
(5) scrap iron, not less than 3 men;
(6) sacks or bags exceeding 105 pounds, not less than 6 men per side, in addition to a 16 man gang;
(7) loading grain or meal, not less than 10 men;
(8) loading soft-trimming grain ships, not less than 5 men per spout; and
(9) hand trimming, not less than 5 men.

6. According to the "50%–50% rule," a gang working with general cargo would be composed of 8 members from Local 1830 and 8 members from Local 1833. On its face this system appears quite equitable; however, because of continuous fluctuation in the membership of Locals 1830 and 1833, a real threat of discriminatory treatment exists. *See United States v. International Longshoremen's Ass'n*, 334 F.Supp. 976, 978–79 (S.D.Tex.1971) (Garza, J.) A local with twice the membership would employ proportionally fewer of its members than the smaller local. Although the *reality* of discriminatory treatment was not proven in this case, the *threat* or *potential* is obvious and is violative of 42 U.S.C. § 2000e–2(c)(2).

priority system is unlike seniority systems that characterize other hiring procedures.[7]

The jobs performed by members of each gang can be categorized according to prestige and difficulty: the most prestigious include foreman, pusher and operator; the less strenuous being flagman, checker and waterboy. The same hourly wage is paid for all categories of work.

[2] The district court found no credible evidence to support appellant's contention that appellees discriminated against blacks in either the volume or the nature of work assigned to longshoremen at the Port of Baton Rouge. Since 1955 there have been eighty-four members of Local 1830 assigned to the foreman and pusher positions. Currently there are more blacks than whites assigned to these preferred positions. Furthermore, since 1956 black members of Local 1830 have been assigned 54% of the longshoremen's work at the Port of Baton Rouge, and since the inception of Locals 1830 and 1833 more blacks than whites have been assigned over 700 hours of work per year.[8]

[3] 2. *Appellant's Employment History.* Appellant, a member of Local 1830 since 1959, claims that he has been victimized by a systematic exclusion from the most desirable longshore positions and a restriction on the amount of work assigned. As a result he claims severe financial loss.

The trial court, however, found that although it is undisputed that appellant has averaged fewer work hours per year than other longshoremen, the evidence does not support a contention of employment discrimination. An analysis of appellant's employment record supports the trial court's conclusion:[9]

7. A seniority system tends to lock in the effect of past discrimination. *See Stevenson v. International Paper Co.*, 516 F.2d 103, 111–15 (5th Cir. 1975). Port of Baton Rouge priority system is fair only to the extent that the 50%–50% hiring practice will allow; whenever membership imbalance occurs, inequitable treatment is inevitable.

8. 700 hours per year is the standard to determine distribution of benefits. After a union member works 700 hours during a contract year, he is entitled to vacation and holiday pay, as well as welfare benefits. Appellant did not prove that the 50%–50% rule *actually* deprived blacks of employment opportunities. He merely established that the system would *tend to* result in a discriminatory effect. In this situation he is not entitled to recover back pay.

9. This chart is based on the testimony of Russell Dibenedetto, an employee of the Baton Rouge Steamship Association, who compiles employment records on each longshoreman.

Employment Status \ Interval	May 7, 1972–April 29, 1973 [52 weeks]	April 30, 1973–Sept. 30, 1973 [22 weeks]	Oct. 1, 1973–March 31, 1974 [26 weeks]	Total: May 7, 197 March 31, 1974 [100 weeks
Hired	138	61	48	247
Available, But Not Hired	19	0	35	54
Refused Assignment	3	1	1	5
Absent From Shape-up	118	56	52	226

Also relating to appellant's availability for job assignment, president of Local 1830, Mark Young, testified that "Bailey was more or less motivated by politics. If he had something pending in the court, and he felt a decision was going to be made, or he got some communication or felt like an election was about to come around, he came around. But right after the election or after he lost a case, Bailey was out of sight for as much as a month or a year . . . . Bailey showed up less than the average longshoreman." It is apparent that neither the stevedoring companies nor the union locals discriminated against appellant; rather, it is clear that work was assigned when appellant made himself available. Appellant worked fewer hours than the average longshoreman because he voluntarily elected not to work by absenting himself from the daily shape-ups.

Similarly, the employment decision to exclude appellant from positions of responsibility and special skill (e. *g.*, foreman, pusher and operator) was rationally based. Appellant never applied for admission to the available training programs necessary to qualify for placement in the skilled positions such as crane operator, winch operator and dozer operator. Furthermore, high absenteeism and erratic, antagonistic behavior contributed to the job placement chosen by the stevedoring companies.[10]

CONCLUSION

[4] As noted above, the district court rejected allegations of discriminatory practices, customs and policies. Nevertheless, we conclude that the trial court's conclusion was clearly erroneous, for "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364 at 365, 68 S.Ct. 525 at 527, 92 L.Ed. 746 (1948); *see United States v. Singer Mfg. Co.*, 374 U.S. 174 at 194–95, n. 9, 83 S.Ct. 1773, 10 L.Ed.2d 823 (1963). Section 703(c)(2) of the 1964 Civil Rights Act states: "It shall be an unlawful employment practice for a labor organization . . . to limit, segregate, or classify its membership or applicants for membership . . . *in any way which would deprive or tend to deprive any individual of employment opportunities* . . . because of such individual's race, color, religion, sex, or national origin . . ." 42 U.S.C. § 2000e–2(c)(2). This court has construed the Act on several occasions and has required a showing of a "discriminatory effect." *United States v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971); *Equal Employment Opportunity Commission v. International Longshoremen's Ass'n*, 511 F.2d 273 (5th Cir. 1975); *Local No. 293 v. Local No. 293–A*, 526 F.2d 316 (5th Cir. 1976) [No. 74–3961, 1976].

In *United States v. Jacksonville Terminal Co., supra*, this court ordered amalgamation of racially segregated locals because "[t]he record clearly disclose[d] that the existence of 'separate but equal' locals has had, and may continue to have, post-Act deleterious effects on blacks." 451 F.2d at 457. The specific discriminatory effect noted by the court was the non-existence of black influence in regional and national union affairs:

> "The BMWE [Brotherhood of Maintenance of Way Employees] Seaboard Federation represents all employees in collective bargaining with the Terminal. Terminal delegates to the Federation convention, where union policy presumably is debated and determined, have always come from the all-white local but have cast one vote for each member of both locals. These delegates have been elected exclusively by members of the white local. Thus we must conclude, and the Union has not disproved, that black BMWE members at the Terminal have had no voice in their bargaining agent's councils. Here, at least, black influence in Federation affairs remains nonexistent.",

451 F.2d at 457. Racially segregated locals, therefore, were violative of the 1964 Civil Rights Act, Title VII. *Equal Emp. Op. Com'n v. International Long. Ass'n, supra*, cited the *Jacksonville Terminal Co.* opinion and ordered consolidation of two racially segregated locals. As in the instant case, the longshoremen of the segregated locals were hired according to the 50%–50% rule—a practice which has discriminatory potential. Judge Goldberg stated:

> "I conclude that the unions cannot [show that the organizational structure would not *tend* to deprive any *individual* of employment *opportunities* or affect his status as an employee] even granting that present longshoremen, whether black or white, are paid the same wages, have equal numbers of representatives on the contract negotiating committee, and, under a common seniority and hiring hall system, could be assured of an equal chance of obtaining longshore work. There are two reasons for this decision. First, black individuals who might potentially seek employment opportunities as longshoremen would tend to be dissuaded by the onus they would then have to bear of working through an involuntarily all-black organization. Second, there is a significant likelihood that the contracts which would emerge from bargaining sessions in which all of labor's representatives were charged with serving all of the employees would better the employment status of present and potential black employees than does a bargaining committee in which half of the representatives are charged with serving

10. The trial court specifically recounts from the evidence an incident in its findings of fact:

> "In 1973 the plaintiff had a dispute over not being retained as a flagman on the day following a four hour shift that he worked as such. Instead of filing a grievance or following established procedures, the plaintiff, as a result of this dispute, proceeded to sit on the cargo, causing an illegal work stoppage without the consent or approval of his union. This resulted in his being arrested and charged with trespassing."

white employees and the other half with serving black employees."

511 F.2d at 277. Judges Thornberry and Godbold specially concurred:

"[T]he merits of this case can be decided without holding that segregated locals constitute a per se violation of Title VII. As Judge Goldberg notes . . . the lower court here specifically found that 'the Government has discharged . . . [its] burden . . . [of showing] that the maintenance of segregated locals constitutes a pattern or practice depriving individuals of working opportunities, because of their race or national origin.' 334 F.Supp. at 980. . . . We read this language to make merger of segregated locals mandatory *whenever they are shown to have had actual discriminatory effect on employment opportunities.* Since in this case Judge Garza found that employment discrimination resulted from the existence of segregated locals, *Jacksonville Terminal* left him no discretion to refuse merger."

511 F.2d at 280. (emphasis added).

Local 293 v. Local 293–A, supra, likewise expressly recognizes the necessity to demonstrate an actual discriminatory effect. 526 F.2d 316 at 319, n. 4.

In this case, as in *Equal Emp. Op. Com'n v. International Long. Ass'n, supra*, the longshoremen were hired according to the 50%–50% rule. Because of the inevitable fluctuation in union membership, there is a real possibility for discriminatory treatment. Judge Garza recognized the inherent discriminatory potential of the 50%–50% rule:

"With the exception of the port of Brownsville, generally the longshoremen's work is divided between the White and Negro locals on a fifty-fifty basis. On its face, this would seem to be a fair shake for the races, but this does not tell the whole story. If in any port there are one hundred Whites available to work on the waterfront as longshoremen and two hundred Negroes, and the work is divided fifty-fifty between the locals, it is obvious that the one hundred Whites will work more hours than the Negroes. The fifty-fifty rule would be ideal if there were an equal number of White longshoremen to Negro longshoremen in every port, but this is not the case. The same situation would exist if instead of one hundred White and two hundred Negro longshoremen, there would be two hundred White and one hundred Negro longshoremen in a given port. In that situation, the Black longshoremen would work more hours than the White."

United States v. International Longshoremen's Ass'n, 334 F.Supp. 977 at 978–79 (S.D.Tex.1971).

We conclude that the district court erred when it refused to grant appellant's motion for permanent injunction against the continued operation of segregated locals. The 50%–50% hiring practice represents a threat of employment discrimination and thus violates 42 U.S.C. § 2000e–2(c)(2), which makes an employment practice unlawful if it "would deprive or tend to deprive" an individual of employment opportunities. It is unnecessary to reach the issue of whether segregated locals represent a *per se* violation of the 1964 Civil Rights Act.

Reversed and remanded.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1975

No. 74 - 2544

D. C. Docket No. CA 71-79

ALTON J. BAILEY,
Plaintiff-Appellant

versus

RYAN STEVEDORING COMPANY, INC., ET AL.,
Defendants-Appellee.

Appeal from the United States District Court for the Middle District of Louisiana

Before COLEMAN and INGRAHAM, Circuit Judges, and O'Kelley, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby re-

manded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

March 11, 1976

Issued as Mandate: June 25, 1976

CORRECTED

Alton J. BAILEY, Plaintiff-Appellant,

v.

RYAN STEVEDORING COMPANY, INC., et al., Defendants-Appellees.

No. 74-2544.

United States Court of Appeals, Fifth Circuit.

June 17, 1976.

Appeal from the United States District Court for the Middle District of Louisiana; E. Gordon West, Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion March 11, 1976, 5 Cir., 1976, 528 F.2d 551).

Before COLEMAN and INGRAHAM, Circuit Judges, and O'KELLEY, District Judge.

PER CURIAM:

The Petition for Rehearing on behalf of Locals 1830 & 1833—General Longshore Workers, ILA, AFL–CIO is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

Before BROWN, Chief Judge, WISDOM, GEWIN, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY, GEE and TJOFLAT, Circuit Judges.

CLARK, Circuit Judge (dissenting):

I respectfully dissent.

Democracy is the linch-pin of labor union representation. Before the law recognizes any organization as the exclusive bargaining agent of American workers, it requires that a majority of those represented select their own steward in an election process conducted under laboratory conditions. I construe the panel opinion to override the vital associational rights involved in this case on the basis of legal deductions that are contrary to the facts and to valid prior precedent in this circuit.

In Bailey's case, 204 out of the total membership of 232 in Local 1830 signed a statement disavowing his putative representative status as a class action plaintiff. In part, these were their words:

We state Boudreaux, Wells and Bailey do not represent us as a class in their effort to integrate the unions. If the unions are integrated, we will lose (1) our right to equal jobs with the whites, (2) our right to elect our own officers and grievance committees, and (3) our rights to our own meetings and a chance to hold office and act for the black longshoremen to protect their interest.

. . . . . .

We do not want these three men, Boudreaux, Wells and Bailey to act for us as a class in this suit and we do not want our Local Union destroyed. We understand that if any of us want to we have the right to join the white union or stay a member of the black union now.

Accepting this overwhelming rejection, this court affirmed the district judge's refusal to allow the action to proceed as a class action.

The panel also found record support for the district court's finding that Bailey's contention of personal employment discrimination was absolutely meritless. The record established that he worked less than other longshoremen solely because he failed to present himself for work under rational, nondiscriminatory employment rules. We likewise affirmed that his failure to qualify for skilled positions was attributable to his high absenteeism and erratic, antagonistic behavior.

Yet without a class and without an individual plaintiff who had suffered any loss from the asserted discriminatory practices or conditions, this court reversed the district judge's refusal of injunctive relief and mandated him to grant Bailey's motion to force the merger of two independent union locals who do not want to merge.

Assuming the court had a plaintiff before it with standing to present a concrete controversy, the prior precedent of this circuit would require the plaintiff to demonstrate *an actual discriminatory effect* before granting such relief. Here the appellate court concludes that, despite the clear proof it finds cogent to deny the class action and individual claim, it must apply a presumption that segregated local union organizations possess "a real *possibility* for discriminatory treatment" and represent "a *threat* of employment discrimination" and that these future contingencies render the trial court's refusal to enjoin an abuse of discretion. With respect, I submit the panel is wrong, bad wrong.

I can take some comfort from the fact that no other judge joins me in this dissent, because it indicates I am in error in concluding that *Bailey* does not slide across the rule that no proof short of actual discrimination will suffice to destroy First Amendment protections abridged here. *Bailey* purports to follow precedent, so next time the question arises at least we can say it did.

C-1

FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM UNITED STATES DISTRICT COURT

(Filed: March 11, 1971)

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

ALTON J. BAILEY
Plaintiff

versus

CIVIL ACTION
NUMBER 71-79

RYAN STEVEDORING COMPANY, INC., (2) ROGERS TERMINAL AND SHIPPING CORPORATION, (3) LOUISIANA STEVEDORES, INC., (4) RAMSAY, SCARLETT AND COMPANY, INC., (5) BATON ROUGE MARINE CONTRACTORS, INC., and (6) LOCAL 1830 and LOCAL 1833, GENERAL LONGSHORE WORKERS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO
Defendants

(Filed: April 23, 1974)

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E. GORDON WEST, District Judge:

This suit is another in a long list of suits and charges filed by the plaintiff, Alton J. Bailey, against several stevedoring companies and against two local longshoremen's unions. Plaintiff is a longshoreman who has worked, off and on, for many years at the docks in Baton Rouge, Louisiana. He is a member of Local 1830, General Longshore Workers, International Longshoremen's Association, AFL-CIO. This suit was previously consolidated for trial with a similar suit filed by another longshoreman, one Antoine Boudreaux, which suit was amicably settled prior to trial. The present suit was tried, without a jury, on April 8, 1974, and most of the exhibits, interrogatories, answers to interrogatories, pre-trial orders and discovery taken in connection with the Boudreaux suit were made a part of this record either physically or by reference. In the final pre-trial order entered herein on March 15, 1974, which governs these proceedings, the plaintiff listed his contentions as follows:

> "1. The defendants maintain a policy, practice, custom and/or usage of discriminating against plaintiff and other Negro (or Black) persons in the class because of race or color with respect to:
>
> "a) Compensation, terms, conditions and privileges of employment.

"b) By making discriminatory and retaliatory discharges.

"c) By refusing to hire and/or to make lateral transfers and promotions.

"d) By refusing to employ Negro (or Black) persons for certain jobs, e.g., Foreman, Walking Foreman, Checker or Clerk and Crane Operator, etc.

"e) More particularly by refusing to hire the plaintiff, ALTON J. BAILEY, because of his efforts and attempts to obtain equal employment opportunities for the Blacks.

"f) By denying and/or refusing to employ Black persons for certain jobs and from otherwise denying and/or refusing Black persons equal employment opportunities on the ground of their race and color in violation of Title VII of the Civil Rights Act of 1964.

"g) By cooperating with and refusing to restrain the defendants, LOCAL 1830 and LOCAL 1833, GENERAL LONGSHORE WORKERS, I.L.A., AFL-CIO, from maintaining racially segregated labor organizations in violation of Title VII of the Civil Rights Act of 1964.

"2. The defendants have instituted and maintained the following practices, policies, customs and usages which violate Title VII of the Civil Rights Act of 1964, viz:

"a) Employ persons according to their race and color dividing jobs equally between the defendants, LOCAL 1830, comprised entirely of Negro persons and a membership of approximately 200, and LOCAL 1833, comprised entirely of White persons and a membership of approximately 100.

"b) White persons have twice as great of an opportunity to secure employment with the defendants Stevedoring Companies as do the Black persons.

"c) The defendants reserve the most undesirable jobs for Black persons and have failed and refused to employ Black persons as Walking Foremen, Checkers or Clerks and Crane Operators.

"d) The defendants, LOCAL 1830 and LOCAL 1833, are in violation of Title VII of the Civil Rights Act of 1964 insofar as they are parties to 'Collective Bargaining Agreements' with the defendants Stevedoring Companies which recognize racially segregated labor organizations and job assignments."

These contentions are, of course, all denied by each defendant.

Plaintiff sought to have this suit considered by the Court as a class action. Defendants objected to this procedure. After hearing the evidence in the case, and after carefully considering the entire record in this case, including the many exhibits made a part thereof, the Court concludes that the

plaintiff has failed completely to carry the burden of proving his contentions and in support of this conclusion the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The plaintiff, Alton J. Bailey, is a longshoreman who has worked off and on at the Baton Rouge docks for the past fourteen years. He became a member of Local 1830, General Longshore Workers, International Longshoremen's Association, AFL-CIO, (hereinafter "Local 1830") in 1960.

2. Local 1830 was organized in 1955. It was, at the time of its organization, comprised of all black members, and its membership is still all black. It, together with Local 1833, has had collective bargaining agreements with the various stevedore companies working the Baton Rouge port since 1956.

3. Local 1833, General Longshore Workers, International Longshoremen's Association, AFL-CIO, (hereinafter "Local 1833") was organized in 1956 and has, since that date, been a party with Local 1830 to collective bargaining agreements with the same stevedoring companies referred to above. Local 1833 has always been and still is a union with an entirely white membership.

4. Local 1830 and Local 1833 are each a part of what is called the South Atlantic and Gulf Coast District of the International Longshoremen's Association, AFL-CIO, which District is fully integrated at the District level with the officers and executive board of the District equally divided between black and white members. There are more black locals than white locals in the District, and each local has one vote in

District affairs.

5. Ryan Stevedoring Company, Inc., Rogers Terminal and Shipping Corporation, Louisiana Stevedores, Inc., Ramsay, Scarlett and Company, Inc., and Baton Rouge Marine Contractors, Inc. are all stevedore companies who have done or are doing stevedore work at the Baton Rouge docks.

6. The plaintiff, Alton Bailey, joined 1830 in 1960. In 1964 he was a candidate for Secretary of that local, and was defeated. In 1966 he ran for President of Local 1830 and lost. In 1969 he again ran for President and was elected for a term to begin on February 27, 1969. At the time of this election, both locals were on strike, but a new contract had been negotiated. The plaintiff, upon becoming President, refused to sign the contract on behalf of the union despite the desire of the members to enter into the contract. The membership of the two locals held a "rump" meeting on the street because plaintiff refused to call a meeting. The members of both locals went back to work over plaintiff's opposition. Thereafter the plaintiff signed the contract which the members had approved. As a result of the manner in which Local 1830 was being run, the International Association removed Mr. Bailey from office. This was in May of 1969.

7. Mr. Bailey brought suit in his Court and on June 27, 1969, this Court ordered him reinstated as President.

8. In October of 1969 the International Association with the approval of this Court placed Local 1830 in trusteeship and Mr. Bailey immediately filed suit to have the trusteeship set aside. He took this case all the way to the United States Supreme Court and lost.

9. In 1968 Mr. Bailey filed certain charges with the N.L.R.B. against Local 1830. This dispute was settled and Mr. Bailey was paid the sum of $829.00. Later he filed another suit in this Court in an attempt to recover additional money but was unsuccessful.

10. When the trusteeship ended in 1971, the plaintiff again ran for President and lost. In 1974 he again ran for President and lost.

11. After his loss in 1971, plaintiff filed a protest with the United States Secretary of Labor, who in turn filed suit in this Court to set aside the election, without success.

12. While plaintiff was President of Local 1830 in 1969, he became engaged in a dispute about expenditure of union funds. He apparently presented the Treasurer with two bills for over $3,000.00 each which he wanted paid with union funds. These bills apparently represented bills for attorney fees he had incurred in connection with his personal litigation against the union. The Treasurer would not sign the checks so the plaintiff opened a new union bank account on which he could sign the checks. This dispute also entered into the reasons given for his removal from office as President.

13. Despite all of this litigation and despite all of these charges, Mr. Bailey has continued to be assigned what this Court finds to be his fair share of work at the docks when he has made himself available.

14. Mr. Bailey's problems do not in any way represent the problems of the other members of Local 1830. He is not in any way a representative of other members of this local. There are no common issues of fact or law present such as to make this a class action. The problems complained of by Mr.

Bailey are peculiar to him alone.

15. A total of 204 members of Local 1830 out of an approximate membership of 232 members have voluntarily petitioned this Court stating that Mr. Bailey's claims and contentions are not representative of theirs and that they do not wish to be represented by Mr. Bailey. A similar petition was also filed in the Boudreaux case and made a part of this record by reference. Therefore, not only are there no common issues of fact or law, there also is no definable class so large as to require a class action suit.

16. There is not one bit of evidence in this record to support plaintiff's claim that the defendants have discriminated against the plaintiff or any other black longshoreman with regard to compensation, terms, conditions or privileges of employment nor is there one bit of evidence as to discriminatory or retaliatory discharges. There is likewise no credible evidence to support a charge that the defendants have refused to hire the plaintiff because of his litigious activities or that they have refused to accord black longshoremen equal employment opportunities.

17. Plaintiff's claim that Local 1830 has twice as many members as Local 1833 and that as a result, when work is divided equally between the two unions the individual members of Local 1830, and particularly the plaintiff, get only half as much work as do the members of Local 1833, is simply not proved. The evidence shows that while prior to 1963, Local 1830 may have had a somewhat larger membership at times than Local 1833, nevertheless, since 1965 the membership of the two locals has been quite comparable. The testimony shows that membership fluctuates almost on a daily basis, but the best evidence available, for example, shows that in 1965 Local 1830 had 168 members and Local 1833 had 147; in 1971 Local 1830 had 214 members and Local 1833

had only 205; in 1973 Local 1830 had 232 members while Local 1833 had 220. These are but examples of random years but the exhibits from which this data comes bears out the conclusion that at least since 1965 the membership in the two locals has been quite comparable.

18. There is no dispute about the fact that work has been assigned on close to a 50-50 basis between the two locals,but that over the years, the black longshoremen have been assigned more working hours than have the white members of Local 1833. From the inception of these locals in 1956 through the year 1973, the black members of Local 1830 have been assigned 54 per cent of all of the longshoremen's work at the docks.

19. During the whole seventeen years from 1956 to 1973, there have been only two years (1971 - 1972) that blacks have not worked more hours than whites.

20. After a union member has worked 700 hours or more in a year, he is entitled to vacation pay, holiday pay, and welfare benefits. In every year since 1956 more blacks than whites have been assigned over 700 hours of work per year.

21. There is no merit to plaintiff's claim that members of Local 1830 were assigned only the dangerous and less desirable jobs. Defendants' exhibit "C" shows that between 1955 and 1974, 84 members of Local 1830 were, at various times, assigned jobs other than those of a general longshoreman. The "high skill jobs" are crane and winch operators; lift operators; dozer operators; equipment operators; boat operators; welders and mechanics. The easiest jobs are those of flagman, water boy and checker. The most prestigious jobs are those of foreman and pusher. Since 1955 there have been 84 members of Local 1830 assigned to such jobs, and as of

now, there are more blacks than whites assigned to these better jobs. During these years, for example, defendant, Baton Rouge Marine Contractors, generally had ten foremen of whom at least four were usually black. The same defendant also shows that since 1967, there have been nine blacks and only three whites who have been given crane operators jobs.

22. There is no credible evidence to support the contention that the defendants have in any way discriminated against blacks in either the volume or the nature of the work assigned to longshoremen at the Port of Baton Rouge.

23. While the evidence supports the contention of the plaintiff, Mr. Bailey, that over the years he has averaged working less hours per year than other longshoremen, it does not, however, support his contention that this in any way resulted from illegal or improper discrimination.

24. Longshoremen's jobs are not assigned on any basis of seniority. Each foreman selects his men at a morning and evening "shape-up." All members of both locals receive the same rate of pay and the same benefits depending on the number of hours worked, regardless of the particular job to which they are assigned. Thus, there is no question of seniority rights involved in this suit.

25. While the plaintiff has worked less hours, on the average, than other longshoremen, this is not due to any discrimination against him, but rather to the fact that he showed up less for shape-ups than did other workers.

26. As was testified to by Mr. Mark Young, the current President of Local 1830, when Mr. Bailey was involved in politics and law suits, he did not make himself available for

work. He would absent himself for weeks and even months at a time. For example, the record shows that in 1965, 1966, and 1967, when the plaintiff was filing charges with the EEOC and running for union office, he apparently worked few, if any, hours. The evidence preponderates in support of the conclusion that during that time he did not make himself available for work. After he lost his bid for office in 1966, he apparently showed up for shape-ups with the result that in 1967-68 he worked 718 hours and in 1968-69 he worked l,392 hours. His working hours in 1968-69 were 253 hours above the average, and his combined hours for the two years were only 216 hours below the overall average. In 1969-70 the record shows that the plaintiff worked no hours. This was during the period that he was serving as President of the local and during the period that he was spending his time litigating with the union and the stevedore companies. In 1971-72 when he was again running for office he worked only part time, making 850 hours in 1970-71, and 784 hours in 1971-72 as compared with an average of 1,240 hours made by other longshoremen. But after he lost the election, and again made himself available for work, he worked in 1972-73 a total of 1,327hours compared to an average of 1,430 hours for other workers. The conclusion is inescapable that neither the locals nor the stevedore companies discriminated against the plaintiff nor deprived him of the opportunity to work when he made himself available. He voluntarily elected not to work as much as the other members of the union. Despite his continued antagonistic attitude against his own union and against the companies for which he worked, they continued to offer him his full share of work whenever he made himself available.

27. While the record shows that many black members of Local 1830 applied for and received training for such jobs as crane operator, winch operator, dozer operator, etc., the

plaintiff admittedly never applied for training to qualify himself for these jobs, despite the fact that he had the same opportunity to do so as did all the other members of his union.

28. In 1973 the plaintiff had a dispute over not being retained as a flagman on the day following a four hour shift that he had worked as such. Instead of filing a grievance or following established procedures, the plaintiff, as a result of this dispute, proceeded to sit on the cargo, causing an illegal work stoppage without the consent or approval of his union. This resulted in his being arrested and charged with trespassing. Despite this fact, the defendants have continued to offer work to the plaintiff. In 1972-1973 he worked 1,327 hours as compared with an average of 1,430 hours worked by other members of the local.

29. The total evidence in this case gives strong support to the conclusions reached by the witness Mark Young, President of Local 1830, when he said "He (Bailey) has kept the union in litigation since 1965. His ultimate objective is to flush local 1830 down the drain."

30. There is simply no credible evidence in this case to support the contention that these defendants, or of any of them, have in any way discriminated against this plaintiff nor in any way deprived him of work in violation of Title VII of the Civil Rights Act of 1964 or in violation of any other federal law.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter pursuant to the provisions of 28 U.S.C. §1343(4) and 42 U.S.C. §2000e.

2. The Court finds as a matter of law that the defendnts

have not, either individually or in concert, maintained a practice, policy, custom or usage of discrimination against this plaintiff or against any other member of either Local 1830 or Local 1833 because of their race, creed or color, and that they have not, as a matter of fact or law engaged in hiring or firing practices, or practices with regard to job assignments, which are in any way violative of the Civil Rights Act of 1964 or of any other federal law.

3. Plaintiff does not present a claim to this Court such as could qualify him to act as a representative of a class as contemplated by Rule 23 of the Federal Rules of Civil Procedure. The facts of this case clearly establish that the claims of this plaintiff are individual in nature and the issues raised by him are not issues common to any definable class too numerous to sue individually if they so desired. As a matter of fact, 204 members of plaintiff's union, out of a total membership of approximately 230, have affirmatively stated, by petition filed of record, that they do not, in any way, share the views of this plaintiff. Thus, as a matter of law, the Court finds that this is not a class action but instead is an individual suit by this plaintiff, Alton J. Bailey, for no one's benefit but his own.

4. During the trial of this case the Court announced that the issue of discrimination based upon hiring practices and the issue of maintenance of separate locals based upon race, would be split. But evidence was permitted to be introduced, as indicated hereinabove, which shows beyond doubt that Local 1830 was chartered as and is in fact a local for blacks only and that Local 1833 was chartered as and is a local for whites only. Since the evidence shows beyond doubt that this maintaining of separate segregated locals has not, in fact, deprived blacks of either hours of work or assignments when qualified to the "better" jobs, the only question remaining is

whether or not the existence of the two segregated locals is per se a violation of the Civil Rights Act of 1964. This Court concludes that there is no per se violation in this case, and that both as a matter of fact and law, under the circumstances of this case, the existence of these two segregated locals does not violate the Civil Rights Act of 1964.

5. This Court adheres to the view stated in *United States v. International Longshoremen's Association*, 334 F. Supp. 976 (S.D. Tex. - 1971) to the effect that it still must be shown that the maintenance of segregated locals constitutes a pattern or practice depriving individuals of working opportunities, because of their race or national origin. In the cited case, the Court found, as a fact, that such deprivation did exist. In this case, the Court has concluded that such is not the case. Neither blacks nor whites have been discriminated against because of the existence of separate unions. As evidenced by the collective bargaining agreements filed as evidence in this case, it is shown that the agreements are bargained for jointly by Local 1830 and Local 1833 and that both locals are covered by one and the same agreement. To force a merger of these two locals, when the membership of both are opposed to it, and when it is conclusively shown by the evidence that both blacks and whites, and particularly blacks, derive many benefits from the segregation, would do a grave injustice to the very people the Civil Rights Act was designed to help. This case can also be easily distinguished factually from *United States v. International Longshoremen's Association*, 460 F.2d 497 (CA 4 - 1972) wherein the Court ordered a merger of two segregated locals. It was clear from the evidence in that case that there was much discrimination in work assignments, and that the blacks were the recipients of the discrimination. In that case the discrimination was found to be a direct result of the segregation. Such is not the case here. In the present case no discrimination has been

shown, and in fact, the blacks have received more work regularly than have whites, and they have not been limited to the less desirable jobs. Their segregated union has protected them admirably, as is seen by the petition filed by 204 of the membership of Local 1830 who oppose any idea of a merger. Thus, the Court concludes as a matter of law, that the maintenance of Local 1830 and Local 1833 as separate locals, one for blacks and one for whites, is not, per se, a violation of the Civil Rights Act of 1964, and further, that under the circumstances of this case, the existence of these two locals on a segregated basis does no violence to any of the provisions of the Civil Rights Act of 1964, especially in view of the fact that the plaintiff stands practically alone in his desire to bring about a merger of these locals.

6. The Court concludes, as a matter of law, that the plaintiff is not entitled to any of the relief which he seeks, and therefore a judgment will be entered herein in favor of the defendants, dismissing this suit in its entirety as plaintiff's cost.

Baton Rouge, Louisiana, April 23, 1974.

s/ E. GORDON WEST
UNITED STATES DISTRICT
JUDGE

(Title and number omitted.) (Filed: April 23, 1974)

JUDGMENT

This cause came before the Court for trial, Honorable E. Gordon West, District Judge,presiding, and the issues having been heard and the Court having duly rendered a decision for written reasons assigned and filed herein,

IT IS ORDERED AND ADJUDGED that judgment be entered herein in favor of the herein named defendants and against plaintiff, Alton J. Bailey, dismissing his suit at his cost.

Baton Rouge, Louisiana, April 23, 1974.

s/ Charles J. Bants

APPROVED:

s/ E. Gordon West
UNITED STATES DISTRICT JUDGE

ORDER GRANTING MOTION TO STAY MANDATE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74 - 2544

Filed: Aug 13, 1976

ALTON J. BAILEY,
Plaintiff-Appellant,

versus

RYAN STEVEDORING COMPANY,
INC., ET AL.,
Defendants-Appellees

Appeal from the United States District Court for the
Middle District of Louisiana

ORDER-

( ) The motion of for recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

(x) The motion of *appellees, Locals 1830 and 1833, General Longshore Workers, International Longshoremen's Association, AFL-CIO,* for recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including *September 15, 1976,* the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certifi-

cate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

s/ Joe Ingraham
UNITED STATES CIRCUIT JUDGE

TITLE VII CIVIL RIGHTS ACT OF 1964
OF EQUAL EMPLOYMENT OPPORTUNITY LAW

42 U.S.C. 2000e-2(c)

Labor organization practices

(c) It shall be an unlawful employment practice for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

EQUAL RIGHTS UNDER THE LAW -
Section 1981

Ch. 21 CIVIL RIGHTS 42 §1981

§1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

R.S. § 1977

TEXT OF AMENDMENTS TO THE CONSTITUTION

Amendment [1]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

EXCERPT - RULE 23(a) and (b) OF FRCP

Rule 23

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to

act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.